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10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**
12 **SAN FRANCISCO DIVISION**

13 IN RE TESLA, INC. SECURITIES
14 LITIGATION

Case No. 3:18-cv-04865-EMC

CLASS ACTION

15 **LEAD PLAINTIFF'S RESPONSE TO**
16 **DEFENDANTS' REQUEST FOR**
17 **JUDICIAL NOTICE**

18 Date: March 5, 2020

19 Time: 1:30 p.m.

20 Location: Courtroom 5, 17th Floor

Judge: Hon. Edward Chen

21 Date Action Filed: August 10, 2018

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I. INTRODUCTION

2 On November 22, 2019, Defendants filed their Motion to Dismiss the Complaint. ECF
3 No. 227. Defendants contemporaneously filed a Request for Judicial Notice asking the Court to
4 consider 26 separate exhibits in connection with their motion. Although courts are typically not
5 allowed to consider materials extraneous to the complaint at the pleading stage, Defendants argue
6 that the Court is allowed to consider these exhibits under the doctrines of judicial notice and/or
7 incorporation by reference. They are wrong. Several of these exhibits, in particular, are subject to
8 neither doctrine and submitted by Defendants only to counter and rebut well-pleaded facts in
9 Plaintiff's Complaint. This is categorically improper and not allowed under binding Ninth Circuit
10 law. *See Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998-99 (9th Cir. 2018).

11 As a preliminary matter, Defendants cite to many documents referenced in the Complaint
12 and use them to present an alternative version of the facts that contradicts the well-pleaded
13 allegations in the Complaint. This is improper. Even where it is appropriate to take judicial notice
14 of a document, “a court cannot take judicial notice of disputed facts contained in such public
15 records.” *Id.* at 999. Similarly, even where a document is incorporated by reference in a complaint,
16 “it is improper to assume the truth of an incorporated document if such assumptions only serve to
17 dispute facts stated in a well-pleaded complaint.” *Id.* at 1003. “This admonition is, of course,
18 consistent with the prohibition against resolving factual disputes at the pleading stage.” *Id.*

19 Here. Defendants frequently use documents referenced in the complaint not just to show
20 that certain information was published but rely on their disputed contents as true. For instance,
21 Defendants rely on Exhibit K, a blog post authored by Musk dated August 13, 2018 that Plaintiff
22 alleges was fraudulent as support for the “fact” that “Mr. Musk believed that PIF stood ready to
23 fund a deal.” *See* Defendants’ Memorandum of Points and Authorities in Support of Motion to
24 Dismiss at 17. This is obviously a highly disputed facts and it is improper for Defendants to
25 request that the Court accept it based on Exhibit K, a document received via judicial notice. *See*
26 *also* Defs. Mem. at 5 (Ex. K), 6 (Ex. P), 7-8 (Ex. N), and 17 (Ex. K). While the Court may consider
27 the contents of these documents either through judicial notice or incorporation doctrine, Plaintiff

1 objects to any consideration of disputed facts within those documents as discussed in *Khoja*.

2 Defendants go even further with their presentation to the Court of Exhibits B, W, X, Y,
 3 and Z. These documents are not incorporated in the complaint and are being offered solely for the
 4 purpose of presenting disputed facts to the Court. Accordingly, they directly violate *Khoja*. These
 5 exhibits, which are articles written by third-parties having nothing to do with the action, are not
 6 subject to judicial notice and are not incorporated by reference into the Complaint. Defendants
 7 cite these articles in support of a counter-factual narrative that has no business before the Court
 8 at this stage of the proceedings. *See* Lead Plaintiff's accompanying Motion to Convert
 9 Defendants' Motion to Dismiss to Motion for Summary Judgment ("Motion to Convert").

10 For the reasons set forth herein, the Court should deny Defendants' Request for Judicial
 11 Notice with respect to these exhibits.

12 **II. ARGUMENT**

13 **A. LEGAL STANDARD**

14 Materials outside the pleadings ordinarily are not considered by a court on a motion to
 15 dismiss. *In re American Continental Corp./Lincoln Sav. & Loan Securities Litig.*, 102 F.3d 1524,
 16 1537 (9th Cir. 1996). Pursuant to Federal Rule of Evidence 201, a "court may judicially notice a
 17 fact that is not subject to reasonable dispute because it: (1) is generally known within the trial
 18 court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose
 19 accuracy cannot be reasonably questioned. Fed R. Evid. 201; *see also Daniels-Hall v. Nat'l Educ.*
 20 *Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) ("Although generally the scope of review on a motion
 21 to dismiss for failure to state a claim is limited to the Complaint, a court may consider evidence
 22 on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the
 23 document is central to the plaintiffs' claim; and (3) no party questions the authenticity of the copy
 24 attached to the 12(b)(6) motion."). Courts may judicially notice documents attached to the
 25 complaint or deemed incorporated by reference because the document at issue "forms the basis
 26 of plaintiff's claim" or is "extensively" referred to in the complaint. *United States v. Ritchie*, 342
 27 F.3d 903, 908 (9th Cir. 2003). "[I]ncorporation by reference 'is a narrow exception . . . It is not

1 intended to grant litigants license to ignore the distinction between motions to dismiss and
 2 motions for summary judgment.”” *Hawthorne v. Umpqua Bank*, 2013 WL 5781608, at *5 (N.D.
 3 Cal. Oct. 25, 2013) (quoting *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998)).

4 When evaluating whether these exceptions apply and to what extent they may be used,
 5 courts must take particular care, because as the Ninth Circuit has observed, there is “a concerning
 6 pattern in securities cases like this one: exploiting these procedures improperly to defeat what
 7 would otherwise constitute adequately stated claims at the pleading stage.” *Khoja*, 899 F.3d at
 8 998. The Ninth Circuit explained that these exceptions have been repeatedly subject to abuse in
 9 securities actions and:

10 [t]he overuse and improper application of judicial notice and the incorporation-by-
 11 reference doctrine . . . can lead to unintended and harmful results. Defendants face
 12 an alluring temptation to pile on numerous documents to their motions to dismiss
 13 to undermine the complaint, and hopefully dismiss the case at an early stage. Yet
 14 the unscrupulous use of extrinsic documents to resolve competing theories against
 15 the complaint risks premature dismissals of plausible claims that may turn out to be
 16 valid after discovery. This risk is especially significant in SEC fraud matters, where
 17 there is already a heightened pleading standard, and the defendants possess
 18 materials to which the plaintiffs do not yet have access... If defendants are
 19 permitted to present their own version of the facts at the pleading stage—and
 20 district courts accept those facts as uncontested and true—it becomes near
 21 impossible for even the most aggrieved plaintiff to demonstrate a sufficiently
 22 ‘plausible’ claim for relief. Such undermining of the usual pleading burdens is not
 23 the purpose of judicial notice or the incorporation-by-reference doctrine.

24 *Id.* at 998-99. Expounding on the particular risk that incorporation-by-reference doctrine poses to
 25 securities class action complaints, the Ninth Circuit further found that:

26 Submitting documents not mentioned in the complaint to create a defense is nothing
 27 more than another way of disputing the factual allegations in the complaint, but
 28 with a perverse added benefit: unless the district court converts the defendant’s
 motion to dismiss into a motion for summary judgment, the plaintiff receives no
 opportunity to respond to the defendant’s new version of the facts. Without that
 opportunity to respond, the defendant’s newly-expanded version of the
 complaint—accepted as true at the pleading stage—can easily topple otherwise
 cognizable claims. Although the incorporation-by-reference doctrine is designed to
 prevent artful pleading by plaintiffs, the doctrine is not a tool for defendants to
 short-circuit the resolution of a well-pleaded claim.

29 *Id.* at 1003.

**B. DEFENDANTS RELY IMPROPERLY ON EXHIBITS B, W, X, Y, AND Z
IN THEIR MOTION TO DISMISS.**

1. Exhibit B – *Financial Times* Article by Arash Massoudi

Exhibit B is an August 7, 2018 *Financial Times* article by Arash Massoudi entitled “Saudi Arabia’s sovereign fund builds \$2bn Tesla stakes.” Defendants claim that it is subject to judicial notice and incorporation by reference because “Plaintiff purports to refer to or rely on the *Financial Times* article at paragraph 90 of the [Complaint].” Defendants are incorrect.

Paragraph 90 in the Complaint quotes an analyst report from RBC Capital Markets. The portion of the quote upon which Defendants rely is as follows:

New outside equity? Elon's tone and messaging regarding a potential transaction lead us to believe that there could be significant outside funding lined up. Learning who this is will be important (and relevant for shareholders deciding whether they should stay involved should the deal consummate). We note an ***unconfirmed FT article from today*** indicates that Saudi Arabia's sovereign fund took a 3-5% stake on the public markets, it was also noted they approached Tesla about new shares. In our view, sovereign funds (broadly), cash rich tech companies, Chinese sources and large VCs could all be potential candidates to provide funding.

¶90 (emphasis added). The reference to the “unconfirmed FT article” in the RBC Capital Markets report is fleeting. Moreover, it does not even directly refer to the article Defendants claim, which is not quoted or referred to *anywhere* in the Complaint. Thus, the mere reference to an “unconfirmed FT article” does not allow the Court to consider the article submitted by Defendants at this stage of the proceedings. *See Fabbri v. Wilkinson*, 2019 WL 5781914 (C.D. Cal. Nov. 5, 2019) (C.D. Cal. Nov. 5, 2019) (denying motion to dismiss without prejudice for referencing materials outside the pleadings); *In re Aqua Metals, Inc. Sec. Litig.*, 2019 WL 3817849, at *5 (N.D. Cal. Aug. 14, 2019).

Exhibit B is not incorporated in the Complaint and it is also not appropriate for judicial notice. The purpose of Exhibit B is as evidence to support their claim that Musk was concerned about a “leak” of his plan to take Tesla private. Def. Mem. at 6. As this is a new narrative introduced for the first time in Defendants’ Memorandum of Points and Authorities, it is plainly

1 subject to reasonable dispute between the parties and, therefore, not properly the subject of
2 judicial notice from the Court. *Khoja*, 899 F.3d at 1000. Whether and to what extent the *Financial*
3 *Times* reported on the PIF’s stake in Tesla is irrelevant to the allegations currently before the
4 Court. As Plaintiff explains in his Motion to Convert, Musk’s concerns about a “leak” have no
5 basis in the Complaint and, in fact, run contrary to Plaintiff’s well-pleaded allegations of Musk’s
6 hatred towards short-sellers of Tesla stock. Accordingly, Exhibit B is improperly before the Court.
7 *In re Immune Response Sec. Litig.*, 375 F. Supp. 2d 983, 996 (S.D. Cal. 2005) (declining to take
8 notice of defendants’ exhibits found to be “irrelevant” to the pending motion).

2. Exhibit W – *Financial Times* Article by Jessica Dye

10 Exhibit W is an August 7, 2018 *Financial Times* article by Jessica Dye entitled “Tesla shares
11 move higher on Saudi Arabia fund stake.” While Defendants claim that it is subject to judicial
12 notice, they substantiate their request with the following: “Plaintiff purports to refer to or rely on the
13 *Financial Times* reports at paragraph 90 of the [Complaint] and in the preamble to the CC, which
14 expressly states that it is based on publicly available information.” For the same reasons as Exhibit B,
15 this exhibit is not incorporated into the Complaint and is not properly subject to judicial notice.

16 Exhibit W is an article written by an unrelated third-party. It is not a fact of the sort subject to
17 judicial notice. Similar to Exhibit B, Defendants cite to Exhibit W merely to support a counter-factual
18 narrative that is disputed by Plaintiff and, therefore, not appropriate at the motion to dismiss stage.
19 *See Khoja*, 899 F.3d at 1000; *see also Eastman v. Apple, Inc.*, No. 18-CV-05929-JST, 2019 WL
20 3934805, at *4 (N.D. Cal. Aug. 20, 2019) (courts “cannot take judicial notice of the contents of
21 documents for the truth of the matters asserted therein when the facts are disputed.”); *Rollins v.*
22 *Dignity Health*, 338 F. Supp. 3d 1025, 1031 (N.D. Cal. 2018) (“Defendants repeatedly do what
23 *Khoja* forbids – ask the Court to take judicial notice of documents that they then use as a basis to
24 challenge the factual averments in the complaint.”).

3. Exhibit X – *Wall Street Journal* Article by Rory Jones

26 Exhibit X is an August 15, 2018 *Wall Street Journal* article by Rory Jones, Summer Said &
27 Maureen Farrell entitled “Saudi Arabia Goes High-Tech in Approach to Investing.” Defendants seek

1 judicial notice of the article on the basis that “Plaintiff purports to rely on such materials in the
 2 preamble to the CC, which expressly states that it is based on publicly available information.” Exhibit
 3 X is neither incorporated into the Complaint nor properly subject to judicial notice.

4 Defendants cannot attempt to judicially notice any document whatsoever simply because a
 5 preamble in a complaint makes reference to “publicly available information.” If this were true, then
 6 defendants could reference any document they pleased for whatever reason whenever moving to
 7 dismiss a complaint at the pleading stage. That is clearly not allowed under *Khoja*, which prohibits
 8 the “[t]he overuse and improper application of judicial notice and the incorporation-by-reference
 9 doctrine.” 899 F.3d at 998.

10 In addition, Defendants cite Exhibit X in order to support their claim that significant deals can
 11 be agreed to in short periods of time; thus, Defendants argue, it was entirely plausible for Musk to
 12 believe that funding has been “secured” based only on his short meeting with the PIF on July 31,
 13 2018. Even if this were true (it is not), Defendants cannot rely on this article as proof that financing
 14 deals can be completed in the span of just 45 minutes, an assertion of “fact” that is obviously highly
 15 contextual and subject to reasonable dispute. *See Baird v. BlackRock Institutional Tr. Co., N.A.*,
 16 No. 17-CV-01892-HSG, 2019 WL 4168906, at *5 (N.D. Cal. Sept. 3, 2019) (“the Court may not
 17 take judicial notice of the truth of the information contained in them if Defendants are attempting
 18 to factually rebut Plaintiffs’ allegations.”). Accordingly, the Court should disregard Exhibit X and
 19 Defendants’ arguments based thereon.

20 **4. Exhibit Y – S3 Analytics Article by Ihor Dusaniwsky**

21 Exhibit Y is an August 17, 2018 *S3 Analytics* article by Ihor Dusaniwsky entitled “No Tesla
 22 Short Squeeze, Shorts Up \$1.2 Billion Since ‘The Tweet’”. Defendants seek judicial notice of the
 23 article on the basis that “Plaintiff purports to rely on such materials in the preamble to the CC, which
 24 expressly states that it is based on publicly available information.” Defendants’ attempt to judicially
 25 notice this article is improper.

26 Similar to Exhibit W, Plaintiff’s reference to “publicly available information” in the
 27 Complaint does not allow Defendants to judicially notice Exhibit Y. This is especially true

1 considering the fact that Defendants look to Exhibit Y for the express reason of arguing that Musk
2 did not damage short-sellers, a claim that directly contradicts Plaintiff's well-pleaded allegations.
3 Accordingly, Exhibit Y is not subject to judicial notice. *See Clorox Co. v. Reckitt Benckiser Grp.*
4 *PLC*, 398 F. Supp. 3d 623, 639 (N.D. Cal. 2019) (citing *Khoja*, holding "the Court cannot accept
5 the truth of the contents of the exhibits and create a factual dispute at this juncture").

5. Exhibit Z – *MarketWatch* Article by Claudia Assis

7 Exhibit Z is an August 19, 2018 *MarketWatch* article by Claudia Assis entitled “Tesla short
8 sellers are up \$1.2 billion since Elon Musk’s ‘going-private’ tweet.” Defendants ask the Court to
9 judicially notice this documents because “Plaintiff purports to rely on such materials in the preamble
10 to the CC, which expressly states that it is based on publicly available information.” Exhibit Z is not
11 appropriate for judicial notice because, just like Exhibit Y, it is used to counter Plaintiff’s allegation
12 that Musk harmed short-sellers of Tesla stock.

13 | III. CONCLUSION

14 For the reasons stated above, Plaintiff respectfully requests that the Court deny
15 Defendants' Request for Judicial Notice with respect to Exhibits B, W, X, Y, and Z and disregard
16 all arguments by Defendants that are based on those exhibits.

17 | Dated: December 27, 2019

Respectfully submitted,

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RESPONSE TO RJD
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